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91-881

Supreme Court, U.S.
FILED
OCT 17 1991
OFFICE OF THE CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TONY P. SELLITTI CONSTRUCTION COMPANY,

PETITIONER,

v.

MICHAEL CARYL, STATE TAX COMMISSIONER,
STATE TAX DEPARTMENT OF WEST VIRGINIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

JOHN R. SPON, JR., ESQUIRE
Counsel of Record
Suite 904-911 Sinclair Building
Steubenville, Ohio 43952
(614) 282-3600

Jeffrey J. Rokisky, Esquire
SELLITTI & NOGAY
3125 Pennsylvania Avenue
Post Office Box 2540
Weirton, West Virginia 26062
(304) 723-1400

QUESTION PRESENTED

1. WHETHER THE ARBITRARY AND CAPRICIOUS CLASSIFICATION OF THE "SPECULATIVE CONTRACTOR" UNDER THE WEST VIRGINIA SALES AND USE TAX VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

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TONY P. SELLITTI CONSTRUCTION COMPANY,

Petitioner,

v.

MICHAEL CARYL, STATE TAX COMMISSIONER,
STATE TAX DEPARTMENT OF WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO The Honorable Justice William Rehnquist, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Tony P. Sellitti Construction Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of West Virginia entered in the above-entitled case on July 19, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of West Virginia is unreported and is printed in Appendix A, page 20. The opinion of the Circuit Court of Hancock County, West Virginia, of December 28, 1989, is unreported and is printed in Appendix A, page 14.

JURISDICTION

The judgment of the Supreme Court of West Virginia (Appendix A, page 20) was entered on July 19, 1991. The jurisdiction of the Court is invoked under U.S.C.A. §1257(a).

STATUTE INVOLVED

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF CASE

From 1978 through 1982, the petitioner, Tony P. Sellitti Construction Company, engaged in contracting activities. The petitioner primarily performed these contracting activities while under contract for other individuals. However, due to the economic conditions in the area in which the petitioner worked, petitioner was faced with the choice of laying off his employees and going out of business, or continuing to build and attempt to obtain a purchaser at a later date in the building process.

Due to the fact that the petitioner continued to build without having written contracts, the West Virginia

State Tax Commissioner determined petitioner was responsible to pay sales and use tax on goods and materials purchased. On October 28, 1983, the West Virginia State Tax Commissioner issued an assessment, pursuant to Chapter 11, Article 10 and 15A of the West Virginia Code of 1931 as amended (hereinafter "the Code"), against the petitioner for the period January 1, 1978 through December 31, 1982. The assessment was based on petitioner's failure to remit use tax on its purchases from out-of-state suppliers of materials consumed in its building activities. The total amount assessed including interest and penalties was Twenty Three Thousand Four Hundred Ninety Nine and 10/100 Dollars ($23,499.10). Interest has continued to accrue pursuant to West Virginia Code §11-10-17 (1987). The West Virginia State Tax Commissioner also issued an assessment on October 28, 1983, for petitioner's failure to remit consumer sales tax on its purchasers from in-

state suppliers of materials used in its building activities for the period January 1, 1978 through December 31, 1982. This assessment was pursuant to Chapter 11, Articles 10 and 15 of the West Virginia Code. The total amount assessed was Eight Thousand Three Hundred Thirty Eight and 33/100 Dollars ($8,338.33) including interest and penalties.

Finally, the West Virginia State Tax Department determined that the petitioner had overpaid business and occupation tax on its gross receipts from its speculative building activity at the contracting rate of $2.20 per $100.00 of gross proceeds, West Virginia Code §11-13-2(e)(1983), instead of at the much lower retail rate of $.055 per $100.00 of gross proceeds, West Virginia Code §11-13-2(c)(1983). Because the Tax Department determined petitioner's speculative building activity fell in the retail classification of the business and occupation tax, instead of the contracting classification, the Tax

Department found that the petitioner was due a refund of business and occupation tax in the amount of Eleven Thousand One Hundred Eighty Four and 75/100 Dollars ($11,184.75).

The petitioner appealed the administrative decisions affirming the assessments of consumer sales and use tax in its appeal to the Circuit Court of Hancock County, West Virginia. The petitioner, in its appeal, claimed that W.Va. Leg. Reg. 11-10 Series XV Section 9.01(C)(2)(c), drew an arbitrary and capricious classification, by excluding speculative builders from those persons entitled to an exemption of the sales and use tax under West Virginia Code §11-15-9(7). West Virginia Code §11-15-9(7) provided an exemption from sales and use tax, for certain purchases engaged in certain businesses, including "contracting" businesses. The legislation did not, however, define "contracting" or any other businesses named in these exemptions. The

petitioner claimed that this arbitrary and capricious classification was a violation of the Equal Protection clause of the United States Constitution.

The Hancock County Circuit Court determined that the Tax Commissioner violated the Equal Protection clause "in that builders who build to order are exempt from sales and use tax, while builders who do not have a purchaser at the time of construction are taxed for the same activity" (See Hancock County Circuit Court Order page 18).

The Tax Commissioner timely filed an appeal to the Supreme Court of Appeals of West Virginia. The Supreme Court held that the classification drawn between builder and speculative builder "did not deny equal protection to 'speculative builders' insofar as these statutory tax exemptions were interpreted as excluding 'speculative builders' from the 'contracting'

classification" (See West Virginia Supreme Court Opinion pages 49-50).

REASONS FOR GRANTING WRIT

Petitioner, as well as all other speculative builders in the state of West Virginia, have been subject to sales and use taxes on materials purchased and consumed in the building activity. Builders who had acquired a purchaser prior to the start of the building activity were not subject to such taxes. This is despite the fact that both speculative builders and build-to-order builders operate in substantially the same manner. They purchase similar materials, employ similar methods in incorporating the materials into the final product, and produce a similar final product.

The fact that one builder has procured a purchaser prior to the institution of the building process does not provide a rational basis for the arbitrary and capricious

classification of a speculative builder. This is clearly a violation of petitioner's equal protection rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

By:_____
Of Counsel for Petitioner

JOHN R. SPON, JR., ESQUIRE
Suite 904-911 Sinclair Building
Steubenville, Ohio 43952
(614) 282-3600

IN THE CIRCUIT COURT OF HANCOCK COUNTY,
WEST VIRGINIA

TONY P. SELLITTI
CONSTRUCTION COMPANY,

Plaintiff,

vs. CIVIL ACTION NO. 87-P-121

MICHAEL CARYL, State
Tax Commissioner, State
Tax Department, West
Virginia,

Defendant.

ORDER

On the 7th day of November, 1989, came the plaintiff, Tony P. Sellitti Construction Company, by and through its attorney, Jeffrey J. Rokisky, and as well came Michael Caryl, State Tax Commissioner, State Tax Department, West Virginia, by and through Landon R. Brown, Assistant Attorney General pursuant to an appeal from the administrative decisions of the State Tax Commissioner rendered on September 16, 1987 wherein an Assessment for Use Tax levied on October 28, 1983,

in the amount of Twenty Three Thousand Four Hundred Ninety Nine Dollars and Ten Cents ($23,499.10) including interest and penalties to that date; and an Assessment for Consumer's Sales Tax levied on the same date in the amount of Eight Thousand Three Hundred Thirty Eight Dollars and Thirty Three Cents ($8,338.33) including interest and penalties to that date was upheld.

Petitioner also seeks a refund due him for an overpayment of business and occupation tax, which Petition was granted; however, the Petitioner demands that interest be paid on said sum from the date of the overpayment. The Petition for refund was filed on December 16, 1983; heard on November 22, 1985; and decided on September 10, 1987. Payment has been withheld based on the Commissioner's position that the refund issue is related to the consumers sales and service tax and purchasers use tax assessments.

WHEREUPON, the Court after reviewing the Petition, Brief in Support of Petition and Response of the State Tax Department does find that the following facts were undisputed and/or had been stipulated:

1. That the taxpayer is a resident of and a builder in the State of West Virginia;

2. That during the years 1978 through 1982 no use tax was paid on the purchase of materials for use in the conduct of his speculative building activities. The amount of said purchase is stipulated by the parties. The amounts of the purchase are not relevant for the purpose of this appeal.

3. That during the years 1978 through 1982 no consumer sales tax was paid on the purchase of materials and/or services for use in the conduct of his speculative building activities. The amounts of the purchases are not relevant for the purpose of this appeal.

4. On the 28th day of October, 1983, the State Tax Department of West Virginia advised the petitioner that it had overpaid Business and Occupation Tax for the years 1978 through 1982 in the amount of Eleven Thousand One Hundred Eighty Four Dollars and Seventy Five Cents ($11,184.75).

WHEREUPON, the Court after considering the arguments of counsel, examining points of law and exhibits of the parties, does ADJUDGE, ORDER and DECREE as follows:

1. The assessments involved in this case are not barred by the Statute of Limitations.

2. That the Tax Commissioner exceeded its authority in interpreting applicable tax laws by carving out an exception to statutorily tax exempt activities by specifically exempting contractors with no mention of speculative builders or builders for resale.

3. That the classification of a contractor does violate the equal protection clause of the West Virginia Constitution in that builders who build to order are exempt, while builders who do not have a purchaser at the time of construction are taxed for exactly the same activity.

As such the assessments filed by the Commissioner are hereby ordered invalid and his administrative decision of September 16, 1987, is hereby set aside. Furthermore, the Commissioner shall immediately refund the overpayment of business and occupation tax with interest from the date of approval of the Petition for a Refund.

To all of which the Commissioner objects and excepts.

ENTER this 28th day of December, 1989.

_____
JUDGE

HAVE SEEN AND APPROVED:

_____
JEFFREY J. ROKISKY
Counsel for Plaintiff

_____
LANDON R. BROWN
Assistant Attorney General

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1991 Term

No. 19918

TONY P. SELLITTI CONSTRUCTION COMPANY
Plaintiff Below, Appellee

v.

MICHAEL CARYL, STATE TAX COMMISSIONER
STATE TAX DEPARTMENT, WEST VIRGINIA
Defendant Below, Appellant

Appeal from the Circuit Court of Hancock County
Honorable Callie Tsapis, Judge
Civil Action No. 87-P-121W

REVERSED IN PART;
AFFIRMED IN PART
REMANDED WITH DIRECTIONS

Submitted: May 7, 1991
Filed: July 19, 1991

Jacqueline A. Hallinan
Assistant Attorney General
Charleston, West Virginia
Attorney for the Appellant

Jeffrey J. Rokisky
Sellitti & Nogay
Weirton, West Virginia
Attorney for the Appellee

JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Where the language of the statute is of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing the same is accorded great weight." Syl. pt. 4, Pennsylvania & West Virginia Supply Corp. v. Rose, ___W.Va.____, 368 S.E.2d 101 (1988).

2. "'Where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption.' Syl. Pt. 2, State ex. rel. Lambert v. Carman, State Tax Commissioner, 145 W.Va. 635, 116 S.E.2d 265 (1960)." Syl. pt. 5, Pennsylvania & West Virginia Supply Corp. v. Rose, ____W.Va.____, 368 S.E.2d 101 (1988).

3. The former consumers sales and service tax and use tax regulations excluding "speculative guilders" fromthe former consumers sales and service tax and use tax statutory exemptions for purchases of services, machinery, supplied and material directly

used or consumed in the business of "contracting," W.Va. Code, 11-15-9 (6) [1974] and W.Va. Code, 11-15A-3(3) [1969], were valid and enforceable during the time they were in effect.

4. "'In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W.Va. Const. art. V Sec. 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va.

740, 143 S.E.2d 351 (1965)." Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, ____W.Va.____, 396 S.E.2d 725 (1990).

5. "'"Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause." Syllabus Point 7, [as modified,] Atchinson v. Erwin, [____] W.Va. [_____], 302 S.E.2d 78 (1983).' Syllabus Point 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., ____W.Va.____, 328 S.E.2d 144 (1984)." Syl. pt. 4, Gibson v. West Virginia Department of Highways, No. 19712, ____W.Va.____, _____S.E. 2d ____ (May 24, 1991) (1991 Westlaw 85445).

6. The former consumers sales and service tax and use tax exemptions for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting," W.Va. Code, 11-15=9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], did not deny equal protection to "speculative builders" insofar as these statutory tax exemptions were interpreted as excluding "speculative builders" from the "contracting" classification.

7. Where a required tax return is not filed or a required tax is not paid due to a good-faith challenge to the validity of such requirement(s), the failure to file or to pay "is due to reasonable cause and not due to willful neglect," and a court, upon an appeal of a tax assessment in such a case, should vacate the addition to tax or any tax penalty authorized by W.Va. Code, 11-10-18 or -19, as amended, even if the tax and interest portions of the tax assessment are affirmed.

McHugh, Justice:

In this appeal by the State Department of Tax and Revenue the primary issue is whether "speculative bulders" were to be considered as engaged in the business of "contracting" for purposes of the consumers sales and service tax exemption and use tax exemption, at the time in controversy, for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting." Unlike the Circuit Court of Hancock County, West Virginia, we believe the then effective consumers sales and service tax and use tax regulations excluding "speculative builders" from the tax exemptions in question for those persons engaged inthe business of "contracting" was valid; we also believe, unlike the circuit court, that this distinction between "speculative builders" and "contractors" under the then effective consumers sales and service tax and use tax exemption statutes did not violate equal protection principles. On the other hand, we believe the additions to tax and the

tax penalties were vacated properly by the circuit court.

I

FACTS

From 1978 through 1982, the taxpayer-appellee, Tony P. Sellitti Construction Company, among other business activities, built houses on its own lots to its own specifications, without a construction contract, with the intent of selling the improved realty eventually to other persons. In the type of business in question the taxpayer purchased and consumed or used various building materials and supplies from both in-state and out-of-state vendors. For these purchases the taxpayer did not pay any consumers sales and service tax (in-state vendors) or use tax (out-of-state vendors).

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[1]In contrast, in phases of the economy more conducive to purchases by other persons of real estate lots for building construction thereon by contractors, the taxpayer would, under contract, build houses on other persons' lots to their specifications. This type of business activity is

The then State Tax Department (now the State Department of Tax and Revenue)[2] audited the taxpayer's books and records, and the Business Tax Division of that Department thereafter issued an assessment for consumers sales and service tax and an assessment for use tax. The consumers sales and service tax was for the period January 1, 1978 through December 31, 1982, and the total amount assessed, including tax, interest, addition to tax and penalty, was $8,338.33.[3] The use tax assessment was for the period April 1, 1978 through December 31, 1982, and the total amount assessed, including tax, interest, addition to tax and penalty, was $23,499.10.[4]

The taxpayer timely petitioned for reassessment of the consumers sales and service tax

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[2]W.Va. Code, 5F-1-2(a)(6) [1989]; W.Va. Code, 5F-2-1(f)(1) [1990].

[3]The consumers sales and service tax assessment consisted of tax of $5,519.33, interest (at the time) of $1,347.27, addition to tax of $1,318.26 and penalty of $153.47.

[4]The use tax assessment consisted of tax of $15,240.16, interest (at the time) of $3,252.84, addition to tax of $3,101.58 and penalty of $1,904.52.

and use tax liabilities, contending that it owed nothing for either of these taxes, as the purchases in question were directly used or consumed allegedly in the business of "contracting," for which there was a tax exemption at the time in controversy under W.Va. Code, 11-15-9(6) [1974] (consumers sales and service tax) and W.Va. Code, 11-15A-3(3) [1969] (use tax).[5]

After an evidentiary hearing before the then State Tax Department's Office of Hearings and

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[5] The tax exemption statutes in effect at the time in controversy are as follows. W.Va. Code, 11-15-9 [1974] provided, in pertinent part, the consumers sales and service tax exemption:

> The following sales and service shall be exempt:
>
> ---
>
> (6)...[S]ales of property or services to persons engaged in this State in the business of contracting, manufacturing, transportation, transmission, communication, or in the production of natural resources. Provided, however, that the exemption herein granted shall apply only to services, machinery, supplies and materials directly used or consumed in the businesses or organizations named above[.]

(emphasis added) (The 1979 and 1981 amendments to other subdivisions of W.Va. Code, 11-15-9 are not relevant here. The revision of subdivision (6) and

Appeals, the two assessments were affirmed by the State Tax Commissioner as issued. [6]

5(...continued)
redesignation thereof as subdivisions (5) to (7) by the 1983 amendment occurred after the assessment periods in this case.)

The relevant part of the use tax exemption statute at the time in question, W.Va. Code, 11-15A-3 [1969] stated:

> The use in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> 3. Tangible personal property, the gross receipts fromthe sale of which are derived from the sale of machinery, supplies and materials to contractors, or to persons engaged in the business of manufacturing, transportation, transmission, communication or in the production of natural resources in this State [.]

(emphasis added) (The 1979 and 1981 amendments to other subdivisions of W.Va. Code, 11-15A-3 are not relevant here.)

Since March 1, 1989, which is after the assessment periods in this case, purchases by a "contractor" of tangible personal property or taxable services for use or consumption in the providing of a contracting service are no longer exempt, but, instead, usually are taxable. W.Va. Code, 11-15-8a(a) [1989] (consumers sales and service tax); W.Va. Code, 11-15-9(g) [1989, 1991] (same); W.Va. Code, 11-15A-3(a)(2) [1987] (use tax; it is stated in essence that use tax exemptions follow consumers sales and service tax exemptions).

[6]For the period January 1, 1978 through December 31, 1982, the then State Tax Department notified the taxpayer

The taxpayer subsequently appealed timely to the Circuit Court of Hancock County. That Court vacated the assessments. The circuit court held that the State Department of Tax and Revenue exceeded its authority in promulgating regulations which exclude "speculative builders" from the exemption for certain purchases by persons engaged in the business of "contracting." The circuit court also held that the consumers sales and service tax exemption statute and the use tax exemption statute unconstitutionally denied equal protection, to the extent that those statutes distinguished between contractors and speculative builders.

The State Department of Tax and Revenue brought this appeal.

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[6](...continued)
that the taxpayer was, upon filing a claim for refund, entitled to a refund of West Virginia business and occupation tax in the amount of $11,184.75, due to a reclassification of gross income from contracting ($2.20 tax per $100 of gross income), as reported by the taxpayer, to retail sales derived from "speculative building" activities ($0.55 tax per $100 of gross income).

II

REGULATIONS ON SPECULATIVE BUILDERS

At the time in controversy the then State Tax Department had promulgated legislative rules and regulations for consumers sales and service tax and use tax purposes. Consumers and Use Tax Regulations ("C.U.T. Reg.") Sec. 1.6(A)(3)(c) (1974)[7] provided, in material part:

> (c) Sales of property or services to persons engaged in this State in the business of contracting, manufacturing, transportation, transmission, communciation, or in the production of natural resources [are exempt]. Said sales, to be exempt, must be confined to services, machinery, supplies and materials directly used or

[6](...continued)

The issue of whether the taxpayer was entitled to the business and occupation tax refund was consolidated with the consumers sales and service tax and use tax assessment appeals. Despite its holding that the taxpayer was engaged in contracting for sales and use tax purposes, the trial court inconsistently held that the taxpayer was engaged in a retail sales business for business and occupation tax purposes for the same activities.

[7]This is the format and numbering system utilized for these rules and regulations prior to publication of the "state register" of state agency rules and regulations, also known as the W.Va. Code of State Rules. See W.Va. Code, 29A-2-5 [1982].

consumed in the businesses named in the preceding sentence.

Persons in the business of contracting, manufacturing, transportation, transmission, communication, or in the production of natural resources may purchase tangible personal property and services to be used or consumed in the construction of or permanent improvement of real estate without imposition of consumers tax on such purchases. All other persons, including but not limited to speculative builders or persons constructing for resale, must pay consumers tax on purchases of tangible personalty and services to be used or consumed in the construction of or permanent improvement of real estate.

(emphasis added)

Similarly, C.U.T. Reg. Sec. 3.27 (1974) stated as follows:

Speculative Builders. --Speculative or operative builders are engaged primarily in the construction or repair of real property for sale or rent and are deemed to be the ultimate consumers of all supplies, materials, or equipment used in the conduct of their business. Therefore, consumers tax is applicable to sales to such operative builders and services rendered for them, and use tax is applicable to their purchaes from outside the State.

(emphasis added) C.U.T. Reg. Sec. 3.27 (1974) was identical to a prior regulation, C.U.T. Reg. Sec. 1.99 (1964, 1969).[8]

These regulations distinguish between "speculative builders" and those persons engaged in the business of "contracting." "Speculative builders" are engaged in the business activity of constructing improvements to real property which they

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[8] The corresponding use tax exemption regulation was C.U.T. Reg. Sec. 1.6(B)(1)(C) (974), the relevant part of which stated:

> 1. Use, within West Virginia, of the following tangible personal property is exempt from the imposition of use tax. Basically, any item of tangible personal property which the sale of or purchase of is exempt from consumers tax is also exempt from use tax.
>
> ---
>
> (c) Use of tangible personal property which the receipts from the sale of are not subject to consumers tax. In other words, that tangible personal property which is exempt from consumers tax by reason of Section 1.6 A.3 of these rules and regulations is also exempt from use tax. See, within the aforesaid regulation, subsections enumerated (a) through (j) therein.
>
> This exemption includes the use of tangible personal property by persons engaged

own, in accordance with their own specifications, that is, they do not have a realty improvement contract with another person, and they construct the real property improvements under those circumstances, with the intent of selling the improved realty eventually to other persons. The basic "selling" nature of a "speculative builder's" activities is also recognized in Bassett v. City of Tucson, 137 Ariz. 199, 200, 669 P.2d 976, 977 (Ct. App. 1983), review denied) Ariz. Sept. 15, 1983).

In contrast, "contractors" construct improvements to real property which other persons own, in accordance with the other persons' specifications, that is, the realty improvement work or work and materials are furnished in the fulfillment of a realty improvement contract with another person. See, Koppers Co. v. Dailey, 167

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8 (...continued)
within this State in the business of transportation, manufacturing, transmission, communication, or in the production of natural resources.

W.Va. 521, 280 S.E.2d 248 (1981) (business and occupation tax case).

The consumers sales and service tax exemption and the use tax exemption, addressed by these regulations, and set forth in, respectively, W.Va. Code, 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], see supra note 5, are for certain purchases by persons engaged in certain businesses, including "contracting" businesses. The consumers sales and service tax and the use tax legislation at the time in controversy did not define "contracting" or any of the other businesses named in these exemptions. A "contracting" business was defined, however, by the related West Virginia business and occupation tax legislation at the time, specifically, W.V. Code, 11-13-1 [1972], which provided (in the last paragraph thereof) as follows: "'Contracting' shall include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or

structure, or any part thereof, or for the alteration, improvement or development of real property." (emphasis added)[9] This related statutory definition of "contracting" supports the regulations' exclusion of "speculative builders" from the sales and use tax exemptions for certain purchases to be used or consumed directly in "contracting" businesses because "speculative builders" do not work "in the fulfillment of a contract" for the improvement of real property; instead, they work for themselves.

For the same reason the taxpayer's reliance upon Stolze Lumber Co. v. Stratton, 386 Ill. 335, 54 N.E.2d 554 (1944), is misplaced. That case involved actual "contractors" working under realty improvement

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[9] Beginning in 1987, the consumers sales and service tax statute, W.Va. Code, 11-15-2(o) [1987], defined "contracting" in language almost identical to this business and occupation tax statute's definition of that term. The current version of the consumers sales and service tax statute's definition of "contracting," W.Va. Code, 11-15-2(o)(1), last amended in 1989, is also very similar. Rather than changing the law, these definitions appear to confirm the existing practical construction by the then State Tax Department of the formerly undefined term of "contracting" under the sales and use tax statutes.

contracts with the owners of the premises. Id. at 335-36, 54 N.E.2d at 555. In contrast, in the present case the taxpayer in its speculative building activities did not work under realty improvement contracts with the owners of the premises; instead, it worked for itself. [10]

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10 Stolze Lumber held that the "retailers' occupation" tax statute there did not apply to the sales of materials to actual contractors because the contractors would "resell" those materials to the owners of the premises (the contractors' customers) upon incorporation of the materials into the buildings owned by the contractors' customers, and the tax there applied only to retail sales of tangible personal property to the ultimate consumer or user, not to sales for resale.

The West Virginia sales and use tax exemption statutes in question, W.Va. Code, 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], see supra note 5, however, did not accomplish this same "anti-pyramiding" of the tax in a true "contracting" situation, for the sales tax did not apply to "sales" by the contractor. In West Virginia the sales tax was not imposed at the time in controversy (and currently is not imposed) on a contractor's furnishing of work or furnishing of materials and work to the owner of the premises. Despite the fact that a contractor, therefore, reasonably could have been deemed the ultimate consumer or user for purposes of the sales or use tax on purchases of materials and other tangible personal property by the contractor, the legislature at the time in controversy chose to exempt the contractor

use tax statutory exemptions for certain purchases to be used or consumed directly in "contracting" businesses. First, "[w]here the language of the statute is of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing the same is accorded great weight." Syl. pt. 4, Pennsylvania & West Virginia Supply Corp. v. Rose, ____W.Va.____, 368 S.E.2d 101 (1988) (upholding State Tax Department's interpretation of another sales tax/use tax statutory exemption). The consumers sales and service tax and use tax exemption statutes in question were ambiguous because the sales and use tax legislation at the time in controversy did not define "contracting." The then State Tax Department reasonably could rely upon the related West Virginia business and occupation tax statute's definition of "contracting," which required the realty improvement work to be "in the fulfillment of a contract[,]" thereby excluding speculative builders, who work for themselves, not "in the

Furthermore, the rules of statutory construction support the regulations in question excluding "speculative builders" from the sales and

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10 (...continued)
from sales or use tax on purchases of materials, etc., directly used or consumed in the contracting business.

The legislative rationale for the sales and use tax exemptions for certain purchases by a contractor apparently was that the contractor paid West Virginia business and occupation tax on its contracting activities at a relatively high rate ($2.20 per $100 of gross income).

In comparision, "speculative builder," as stated in C.U.T. Reg. Sec. 3.27 (1974), quoted previously in the text, was deemed to be the ultimate consumer or user of materials, etc. purchased by it for direct use or consumption in the speculative building business and was, therefore, subject to sales or use tax on such purchases. This administrative conclusion was premised upon the fact that the speculative builder would be the ultimate consumer or user of the materials as tangible personal property. The speculative builder's resale of the materials, which became the speculative builder, would not be subject to sales tax because sales tax applies only to sales of tangible personal property. Accord, G.S. Lyon & Sons Lumber & Manufacturing Co. v. Department of Revenue, 23 Ill. 2d 180, 181-83, 177 N.E.2d 316, 317-18 (1961).

The speculative builder, compared with a contractor, paid West Virginia business and occupation tax on its retail sales of realty at a relatively low rate ($0.55 per $100 of gross income).

use tax statutory exemptions for certain purchases to be used or consumed directly in "contracting" businesses. First, "[w]here the language of the statute is of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing the same is accorded great weight." [11] Syl. pt. 4, Pennsylvania & West Virginia Supply Corp. v. Rose, ____W.Va.____, 368 S.E.2d 101 (1988) (upholding State Tax Department's interpretation of another sales tax/use tax statutory exemption). The consumers sales and service tax and use tax exemption statutes in question were ambiguous because the sales and use tax legislation at the time in controversy did not define "contracting." The then State Tax Department reasonably could rely upon the related West Virginia business and occupation tax statute's

[11] The regulations in this case were promulgated in accordance with W.Va. Code, 11-15-28 [1937] and W.Va. Code, 11-15A-25 [1951]. Current statutory authority to promulgate state tax regulations is contained in W.Va. Code, 11-10-5 [1986].

definition of "contracting," which required the realty improvement work to be "in the fulfillment of a contract[,]" thereby excluding speculative builders, who work for themselves, not "in the fulfillment of a contract" for improvement of another person's realty. This long-standing administrative interpretation is reasonable and is entitled to great weight.

A second rule of statutory construction applicable here is set forth in syllabus point 5 of the Pennsyvlania & West Virginia Supply Corp. v. Rose, ____W.Va.____, 368 S.E.2d 101 (1988): "'Where a person claims an exemption from a law imposing a license or tax, such law is strictly construed agains the person claiming the exemption.' Syl. Pt. 2, State ex rel. Lambert v. Carman, State Tax Commissioner, 145 W.Va. 635, 116 S.E.2d 265 (1960)." Consistent with the foregoing, this Court holds that the former consumers sales and service tax and use tax regulations excluding "speculative builders" from the former consumers sales and service tax and use tax

statutory exemptions for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting," W.Va. Code 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], were valid and enforceable during the time they were in effect.

III

EQUAL PROTECTION

The circuit court agreed with the taxpayer's argument that the former sales and use tax exemption statutes in question were violative of the equal protection guarantees of the State Constitution if such statutes are interpreted as excluding "speculative builders" from the definition of "contracting" businesses. We disagree.

The generally applicable fundamental principle is that the powers of the legislature are almost plenary: "The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby." Sy. pt. 1,

Foster v. Cooper, 155 W.Va. 619, 186 S.E.2d 837 (1972). [12]Moreover, in light of the constitutionally required principle of the separation of powers among the judicial, legislative and executive brances of state government, W.Va. Const. art. V, Sec. 1, courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be shown clearly:

> 'In considering the constitutionally of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches, [W.Va. Const. art. V, Sec. 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not

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[12] The Constitution of the United States, particularly the fourteenth amendment therto, may also inhibit the legislature from enacting certain legislation. Section 1 of the fourteenth amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

> concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, ____W.Va.____, 396 S.E.2d 725 (1990). Accord, syl. pt. 1, Lewis v. Canaan Valley Resorts, Inc., No. 19780, ____W.Va.____, ____ S.E.2d ____ (July 19, 1991) (1991 Westlaw _____). See also syl. pt. 1, State ex rel. Haden v. Calco Awning & Window Corp., 153 W.Va. 524, 170 S.E.2d 362 (1969) (upholding constitutionality of sales tax stautory section).

Accordingly, a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might

operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. Rust v. Sullivan, ____U.S.____, _____ , _____ S.Ct. ____, ____, ____ L. Ed.2d. ____, _____, 59 U.S.L.W. 4451, 4454 (U.S. May 23, 1991).

We now turn specifically to equal protection challenges to legislation. This Court, in syllabus point 2 of Israel v. West Virginia Secondary Schools Activities Commission, ____W.Va.____, 388 S.E.2d 480 (1989), observed that "[e]qual protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity." Israel finally settled, in syllabus point 4, where this state's equal protection concepts, not expressly set forth in this state's Constitution, are located implicitly: "West Virginia's constitutional equal protection principle is a part of the Due Process Clause found in Article III, Section 10 the of the West Virginia Constitution." See also syl.

pt. 3, Robertson v. Goldman, ____W.Va. ____, 369 S.E.2d 888 (1988). The scope of our equal protection concepts "is coextensive [with] or broader than that of the fourteenth amendment to the United States Constitution." Id. (in part).

Most legislative classifications, including those which involve economic rights, such as taxation classifications, are subjected to a minimum level of scrutiny, specifically, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose. We recently reformulated this "rational basis" type of equal protection analysis in syllabus point 4 of Gibson v. West Virginia Department of Highways, No. 19712, ____W.Va.____, ___S.E.2d ____ (May 24, 1991) (1991 Westlaw 85445):

> '"Where economic rights are concerned, we look to see whether the classification is a

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The language of W.Va. Const. art. III, Sec. 10 is: "No personal shall be deprived of life, liberty, or property, without due process of law, and the judgment of his [or her] peers.

> rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause." Syllabus Point 7, [as modified,] Atchinson v. Erwin, [____] W.Va. [____], 302 S.E.2d 78 (1983).' Syllabus Point 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., ____ W.Va.____, 320 S.E.2d 144 (1984)."

Accord, syl. pt. 2, Lewis v. Canaan Valley Resorts, Inc., No. 19780, ____W.Va. ____ S.E.2d ____ (July 19, 1991) (1991 Westlaw _____).

Judge Haymond, writing for the Court in syllabus point 5 of United Fuel Gas Co. v. Battle, 153 W.Va. 222, 167 S.E.2d 890, appeal dismissed and cert. denied, 396 U.S. 116, 90 S. Ct. 398, 24 L. Ed. 2d 309 (1969), stated this "rational basis" equal protection test in a similar fashion in a case rejecting a challenge to the constitutionality of a classification under the West Virginia business and occupation tax statute:

> A state by its legislature may make reasonable classifications in enacting statutes [,] provided the classifications are based on some real and substantial relation to the objects sought to be accomplished by the legislation, and a person who assails any such classification has the burden of showing that it is essentially arbitrary and unreasonable.

A corollary principle is that the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L. Ed.2d 511, 517 (1976).

Applying these principles to this case, we believe the distinction between "speculative builders" and "contractors" under the statutes in question does not deny equal protection. Speculative builders, who do not work under realty improvement contracts and who are, instead, essentially engaged in sales of their own improved realty, are rationally distinguished from "contractors," who do work under such contracts with other persons who own the real

estate lots. In addition, limiting the entitlement to sales and use tax exemptions for certain purchases by "contractors" to persons who are actual contractors is a legitimate governmental prupose. Finally, all persons actually in the "contracting" classification are treated the same under the statutes in question. As we stated in Capitol Cablevision Corp. v. Hardesty, 168 W.Va. 631, 285 S.E.2d 412, 419 (1981), "[w]here...the similarity between two businesses is only superficial and they make different products or perform different services, differential treatment in tax assessment will be upheld."

Based upon the above, this Court holds that the former consumers sales and service tax and use tax exemptions for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting," W.Va. Code, 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], did not deny equal protection to "speculative builders" insofar as these statutory tax exemptions were

interpreted as excluding "speculative builders" from the "contracting" classification.

IV

ADDITIONS TO TAX AND PENALTIES

By vacating the tax assessments in their entirety, the circuit court vacated the additions to tax and penalties, in addition to the actual tax amounts and accrued interest. While we believe the taxpayer is liable for the actual tax amounts of the assessments and the nonwaivable interest accruing to the date the tax is paid,[14] this Court concludes, on the other hand, that the circuit court correctly vacated the additions to tax and tax penalties.

W.Va. Code, 11-10-18(a)(1)-(2) [1978, 1986] provide, in material part, for an addition to tax for the failure to file a required tax return or to pay any required tax, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect[.]" Similarly, the pertinent part of

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[14] See, W.Va. Code, 11-10-17(a) [1986] (interest on underpayments).

W.Va. Code, 11-10-19(a) [1978] states that a tax penalty is due from any person required to account for and pay over any tax but "who willfully fails truthfully to account for and pay over such tax [.]" [15]

In the present case the taxpayer challenged the tax assessments in good faith, and there has been a substantial legal controversy concerning the validity of the assessments. Accordingly, this Court holds that where, as here, a required tax return is not filed or a required tax is not paid due to a good-faith challenge to the validity of such requirement(s), the failure to file or to pay "is due to reasonable cause and not due to willful neglect," and a court, upon an appeal of a tax assessment in such a case, should vacate the addition to tax or any tax penalty authorized by W.Va. Code, 11-10-18 or

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[15] The last sentence of W.Va. Code, 11-10-19(a) [1978] provides in essence that such a tax penalty is, in an appropriate case, to be imposed in lieu of an addition to tax under W.Va. Code, 11-10-18 [1978, 1986].

-19, as amended, even if the tax and interest portions of the tax assessment are affirmed. See Pennsylvania & West Virginia Supply Corp. v. Rose, ____W.Va.____, ____, 368 S.E.2d 101, 107 (1988); syl. pt. 8, United Fuel Gas Co. v. Battle, 153 W.Va. 222, 167 S.E.2d 890, and 153 W.Va. at 274-76, 167 S.E.2d at 918-20, appeal dismissed and cert. denied, 396 U.S. 116, 90 S.Ct. 398, 24 L. Ed.2d 309 (1969).

V

CONCLUSION

For the reasons stated in section II and III of this opinion, this Court reverses the final order of the circuit court to the extent that it vacated the tax and interest portions of the tax assessments. On the other hand, for the reasons stated in section IV of this opinion, we affirm the final order of the circuit court insofar as it vacated the additions to tax and tax penalties. We remand this case with directions for that court to modify its judgment in accordance with this opinion.

Reversed in part;
affirmed in part;
remanded with directions.